DOCUMENT RESUME

ED 272 996 EA 018 730

AUTHOR Mondschein, Eric S.; Greene, Loel L.
TITLE Sexual Harassment in Employment and Educational Practices.
PUB DATE 86
NOTE 17p.; In: Jones, Thomas N., Ed. and Semler, Darel P., Ed. School Law Update, 1986 (EA 018 725).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Administrator Responsibility; *Civil Rights; Court Litigation; Elementary Secoedary Education; Employed Women; Employment Practices; *Equal Opportunities (Jobs); *Federal Legislation; Females; Government School Relationship; Legal Responsibility; School Personnel; School Policy; *Sex Discrimination; *Sexual Harassment; Women Faculty
IDENTIFIERS *Civil Rights Act 1964 Title VII; Supreme Court; *Title IX Education Amendments 1972

ABSTRACT

This chapter examines statutory and case law concerning sexual harassment in employment and education practices, recommends policies for prevention, and suggests strategies to resolve complaints. Title VII of the Civil Rights Act of 1964 is the principal federal legislation granting protection from employment discrimination; it is enforced by the Equal Employment Opportunity Commission. The dismissal of "Barnes v. Train" and "Corne v. Bausch and Lomb, Inc." in 1974 illustrates district courts' early reluctance to find sexual harassment a violation of Title VII. Courts have generally reversed this position. The Supreme Court resolved the controversial application of Title IX of the Education Amendments of 1972 in the 1982 "North Haven Board of Education v. Bell" decision, by holding that Title IX does prohibit sex discrimination in any educational endeavor receiving federal finaacial assistance; this action has given employees of educational institutions and students a clear avenue of redress under Title IX. The chapter presents a sample policy for school districts that includes definitive and procedural statements. Employers should establish awareness programs for employees and students on responsibilities and legal requirements. Employers should use proper investigative procedures in the event of a complaint. Individuals must be assured that their complaints will receive full attention. (CJH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED272996

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

5

Sexual Harassment in Employment and Educational Practices

Eric S. Mondschein
Loel L. Greene

Sexual harassment is not a new phenomenon. It has existed in the workplace since men and women have worked together. What is new, however, is society's attitude toward sexual harassment. Once considered a joke or of little importance, sexual harassment has been identified as being a widespread and significant workplace problem that needs to be eliminated. For example, in a 1976 survey reported in *Redbook* magazine, approximately 90% of the 9,000 respondents reported that they had experienced one or more forms of sexual harassment.[1] The majority of respondents indicated that they found the behavior embarrassing, demeaning, or intimidating.[2]

Since 1976, numerous surveys and research studies have been conducted on the subject of sexual harassment.[3] These findings indicate that sexual harassment is a serious social problem which affects primarily women but also men of all ages, racial, socio-economic, and occupational groups, although younger women are the most vulnerable. Sexual harassment is not the fault of the victim. However, most victims often do not report sexual harassment due to feelings of isolation, guilt, and the fear of losing their jobs or other retaliation.

This chapter will examine the statutory and case law concerning sexual harassment in employment and education practices. It will also provide recommendations and suggestions for developing policies and procedures for the prevention of sexual harassment and strategies for effectively resolving complaints.

---

1. Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, 149 Redbook 217-224 (Nov. 1976).

2. *Id.*

3. Silverman, *Sexual Harassment: Working Women's Dilemma*, 3 Quest: A Feminist Quarterly (Winter 1976); K. MacKinnon, *Sexual Harassment: The Experience*, The Criminal Justice System and Women (Price & Sokoloff eds. 1982); J. Abramson, Old Boys, New Women: The Politics of Sex Discrimination (1979); L. Farley, Sexual Shakedown: Sexual Harassment of Women on the Job (1978); K. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979); E. Collins & T. Blodgett, *Sexual Harassment — Some See It Some Won't*, Harv. Bus. Rev. (March-April 1981).

EA 018 730

Title VII

Title VII of the Civil Rights Act of 1964 is the principal federal legislative protection for individuals who believe they have been victims of discrimination in employment. Title VII prohibits discrimination on the basis of race, color, religion, national origin or sex. Specifically it provides in part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; and (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.[4]

In addition, Congress established the Equal Employment Opportunity Commission, which is the administrative agency that provides for the monitoring and enforcement of title VII.

On April 11, 1980, the Equal Employment Opportunity Commission issued interim amendments to its guidelines on discrimination on the basis of sex "to clarify its position on ... sexual harassment and to invite the public to comment on the issue."[5] The commission's final guidelines were issued with minor modification on September 23, 1980, and provide:

> Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or affect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[6]

The guidelines do not provide specific definitions between offensive and inoffensive behaviors or conditions in the workplace but they do recognize that such conduct may constitute sex discrimination. Clearly, acquiescence to sexual advances, requests for sexual favors or other conduct of a sexual nature constitutes sexual harassment when it is a

4. 42 U.S.C. § 2000e-2.

5. 45 Fed. Reg. § 25,025 (1980).

6. 29 C.F.R. § 1604.11(a). It should be noted that EEOC in defining the terms "unwelcome sexual advances" and "unreasonable interference with work performance" will look to the "record as a whole and at the totality of the circumstances" to determine whether alleged conduct amounts to sexual harassment.

term or condition of employment, and would be contrary to sections (1) and (2) of the guidelines. In addition, promises or threats by a supervisor to grant a promotion, a raise, or other benefits in exchange for submission to sexual advances; or to fire, demote, or transfer in retaliation for a refusal would be similarly illegal. Under section (3), a sexual advance not directly linked to compensation, training, promotion, termination or other term of employment may be considered unlawful if it interferes with the person's work performance or creates an environment in which a person's work would likely be adversely affected. Therefore, sexual advances or other such conduct could become unlawful when they are so frequent or abusive that they become part of the working conditions of the employer.

Under the guidelines an employer is held responsible for the acts of its *agents* and *supervisory employees* "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[7] In contrast, an employer is held responsible for *conduct between employees* "in the workplace where the employer (or its agents or supervisory employees) *knows or should have known* of the conduct, *unless* it can show that it took immediate and appropriate corrective action."[8] Moreover, an employer may also be responsible for sexual harassment of its workers by non-employees in the workplace "where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[9]

Individuals who believe that they have suffered discrimination in violation of title VII must exhaust their administrative remedy by filing with the Equal Employment Opportunity Commission before they may proceed to the federal courts.[10] It should be noted that most states have promulgated statutes prohibiting discrimination in employment. Some state and local statutes have provisions specifically prohibiting sexual harassment in employment or educational practices.[11] Therefore, individuals may consider filing complaints of discrimination with state or local agencies.

---

7. 29 C.F.R. § 1604.11(c).
8. 29 C.F.R. § 1604.11(d).
9. 29 C.F.R. § 1604.11(e).
10. Under title VII individuals have 180 days in states where there are no state agencies or 300 days in states where Fair Employment Practice agencies exist to file charges of discrimination. EEOC or FEP agencies conduct investigations, administrative hearings, issue determinations and negotiate conciliation agreements. Parties may file suit in federal district court 180 days after a charge has been filed or 90 days after EEOC issues their findings. In some instances EEOC may file suit on behalf of a complainant when conciliation fails. *See* 29 C.F.R. § 1601.1-.29.
11. *See, e.g.*, Wash. Rev. Code § 49.60 (1962); Mich. Comp. Laws Ann. § 37.2103 (1976); Wis. Stat. Ann. § 111.32(13) (1982); Ill. Exec. Order 80-1 (1980); Equal Opportunities Commission, Madison, Wis. Ordinance § 32.87(j) 1980; D.C. Mayor's Order No. 70-89 (1978). *See also* Board of Educ. of Alamo-Gordo Pub. Schools Dist. No. 1 v. Jennings, 651 P.2d 1037 (N.M. Ct. App. 1982). Sexual harassment constitutes unsatisfactory work performance under state education law.

The Courts and Sexual Harassment

The first case to address the issue of sexual harassment as a violation of title VII was *Barnes v. Train* in 1974.[12] In this case, a woman alleged she was reassigned and her position abolished because she refused to have sexual relations with her male supervisor.[13] The district court granted a motion for summary judgment to dismiss, ruling that the plaintiff failed to state a claim actionable under title VII. The court explained:

> The substance of plaintiff's complaint is that she was discriminated against not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.[14]

In *Corne v. Bausch and Lomb, Inc.*,[15] the same rationale was used to discuss a case brought by women alleging that they were repeatedly subjected to verbal and physical sexual advances by their supervisor. If they cooperated, favorable treatment resulted. Subsequently, the women were compelled to resign to escape these conditions.[16]

In dismissing the case for failure to state a claim, the court explained that the supervisor's actions did not reflect company policy and were "nothing more than a personal proclivity, peculiarity or mannerism.[17] The court also stated that "there is nothing in (title VII) which could reasonably be construed to have it apply to 'verbal and physical advances' by another employee, even though he be in a supervisory capacity where such conduct had no relationship to the nature of em-

---

12. 13 Fair Empl. Prac. (BNA) Cas. 123 (D.D.C. 1974), *rev'd sub nom*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). It should be noted that almost all cases involve female plaintiffs. However, the principles apply to either sex. *See*, e.g., Huebschen v. Department of Health and Social Servs. 547 F. Supp. 1168 (W.D. Wis. 1982). A male employee was demoted for ending a sexual relationship with a female supervisor, and in Wright v. Methodist Youth Services, Inc. 511 F. Supp. 307 (N.D. Ill. 1981), a male employee was sexually harassed by a male supervisor in violation of title VII. For a discussion on sexual harassment in the workplace, *see* Polansky, *Sexual Harassment at the Workplace*, 8 Human Rights 14 (1980); Seymour, *Sexual Harassment: Finding a Course of Action Under Title VII*, 30 Lab. L.J. 139 (1979); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 Wash. L. Rev. 123 (1977); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 Mich L. Rev. 1007 (1978); McCarthy, Discrimination in Public Employment: The Evolving Law (NOLPE Monograph 1983).

13. 13 Fair Empl. Prac. (BNA) Cas. at 124.

14. *Id.*

15. 390 F. Supp. 161 (D. Ariz. 1974), *vacated and remanded without opinion*, 562 F.2d. 55 (9th Cir. 1977).

16. 390 F. Supp. at 162.

17. *Id.* at 163.

ployment."[18] The court also expressed its concern that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another" if sexual harassment were found to be in violation of title VII.[19]

The *Barnes* and *Corne* decisions illustrate the court's early reluctance to find sexual harassment a violation of title VII. On appeal, however, a different position was taken by the courts. In *Barnes*,[20] the District of Columbia Circuit Court of Appeals reversed, declaring that the "discrimination as portrayed was plainly based on gender."[21] The facts showed that "retention of her job was conditional upon submission to sexual relations – an exaction which the supervisor would not have sought from any male."[22] Thus, the changes were sufficient to state a cause of action under title VII. The court explained, however, that the sexual advance alone did not give rise to a title VII violation:

> The vitiating sex factor ... stemmed not from the fact that what [plaintiff's] supervisor demanded was sexual activity – which of itself is immaterial – but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fostered upon a male employee.[23]

The Ninth Circuit Court of Appeals vacated the *Corne* decision and remanded without opinion.[24]

In *Miller v. Bank of America*,[25] the Ninth Circuit again reversed the lower courts finding that a woman, discharged for refusing the sexual advance of her supervisor, did not state a claim actionable under title VII. The lower court relied on the existence of a company policy prohibiting sexual advances and the fact that the plaintiff did not avail herself of an internal grievance procedure.[26]

The court of appeals was faced with the issue "that if the bank, rather than just Miller's supervisor can be held responsible, the discharge can properly be called on because of Miller's race and sex ... and so a

---

18. *Id.*
19. *Id.*
20. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
21. *Id.* at 989.
22. *Id.*
23. *Id.* at 989 n.49.
24. Carne v. Bausch and Lomb, Inc., 562 F.2d 55 (9th Cir. 1977). *See also* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded sub nom.* on other grounds, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). On remand the district court ruled for the plaintiff, finding "that submission to the sexual advances of the supervisor was a term and condition of employment in violation of title VII." 23 Empl. Prac. Dec. (CCH) 30 (D.D.C. 1980).
25. 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).
26. 600 F.2d at 235-236.

violation of both title VII and 42 U.S.C. § 1981."[27] In finding for *Miller* the court explained:

> Title VII and Section 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which hints at a congressional intention that the employer is not liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes.[28]

The court also rejected the argument that title VII required that a person exhaust an employer's internal remedies before filing a charge.[29]

The case of *Tomkins v. Public Service Electric & Gas Co.*[30] involved allegations that a woman's supervisor made sexual advances and detained her against her will through economic threats and physical force.[31] She complained to the company and sought and received a transfer. After assuming her new position, she was allegedly subjected to disciplinary threats and eventually terminated in retaliation for her original complaint.[32]

The court of appeals found that the demand for sexual favors amounted to a condition of employment imposed upon her because of her sex. The court noted that for a violation of title VII to occur, an employee must have imposed a term or condition of employment in a discriminatory manner:

> Title VII is violated when a supervisor, with actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development — on a favorable response to these advances or demands, and the employer does not take prompt and appropriate action after acquiring such knowledge.[33]

The court distinguished between complaints of sexual advances of a personal nature and those resulting in direct employment consequences resulting from the advances, the latter being a violation of title VII. The supervisor's sexual advances did not amount to a violation until the employer acquired knowledge of them and failed to remedy the problem.[34]

The Court of Appeals for the Fourth Circuit has also been required to consider whether a claim of sexual harassment is actionable under title

---

27. *Id.* at 211-212. Miller alleged that she was discriminated against because of her race and sex.
28. *Id.* at 213.
29. *Id.* at 24.
30. 422 F. Supp. 553 (D.N.J. 1976) *rev'd*, 568 F.2d 1044 (3rd Cir. 1977).
31. 422 F. Supp. at 555.
32. *Id.*
33. 568 F.2d at 1048-49.
34. *Id.*

VII. In *Garber v. Saxon Business Products, Inc.*,[35] a female employee had been fired for refusing to submit to the sexual advances of her male supervisor. The district court dismissed the complaint, and the court of appeals, in a four sentence opinion, reversed declaring "the complaint and its exhibits, liberally construed, allege an employer policy or acquiesence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of title VII."[36]

In 1981, the District of Columbia Court of Appeals was again faced with a sexual harassment case. In *Bundy v. Jackson*[37] the court went a step further than all previous decisions. Bundy alleged that she was continually asked for sexual favors, made the brunt of lewd jokes and that sexual intimidation was a "normal condition of employment."[38] Moreover, when she complained to her supervisor's superiors, they not only joined in the "game" but made sexual advances to her as well.[39]

The court reiterated the position that sex discrimination in employment is not limited to disparate treatment founded solely or categorically on gender; rather, discrimination is "sex discrimination whenever sex is for no legitimate reason a substantial factor in discrimination."[40]

The court, however, went further and addressed the question of whether or not the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the "terms, conditions or privileges of employment."[41] The court answered affirmatively. Relying on numerous decisions involving race discrimination,[42] the court held that "conditions of employment" include "the psychological and emotional work environment — that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation illegally poisoned the environment" and is violative of title VII.[43]

---

35. 552 F.2d 1032 (4th Cir. 1977).
36. *Id.*
37. 641 F.2d 934 (D.C. Cir. 1981).
38. *Id.* at 939.
39. *Id.* at 940.
40. *Id.* at 942.
41. *Id.* at 943.
42. *See, e.g.*, Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert denied*, 406 U.S. 957 (1972). Judge Goldberg explained that "terms, conditions, or privileges of employment" is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. 454 F.2d at 238. *See also*, Caroll v. Talman Fed. Savings and Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d. 87 (8th Cir. 1977); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), *cert denied*, 434 U.S. 819 (1977); Gray v. Greyhound Line East, 545 F.2d 169 (D.C. Cir. 1976); United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978); Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976). It should be noted, however that some courts still require evidence of adverse employment consequences resulting in sexual harassment. *See, e.g.*, Walter v. KFGO, 518 F. Supp. 1309 (D.N.D. 1981), Meyers v. ITT, 527 F. Supp. 1064 (D. Mo. 1981).

The court went on to declare that a violation of title VII would exist under these circumstances even if the plaintiff did not lose "any tangible job benefits as a result of the discrimination."[44]

In a similar case, *Continental Can Co. v. State of Minnesota*,[45] the Minnesota Supreme Court held an employer liable under the Minnesota Human Rights Act because it condoned physical and verbal sexual harassment of the plaintiff by her co-workers, again analogizing to racial harassment cases under title VII, in which employers with knowledge of the harassment permitted it to continue. The court observed that sexual harassment is most readily recognized when promotion or retention of employment is conditional on dispensation of sexual favors. The court noted however, that "(it) is as invidious, although less recognizable, when employment is conditional either explicitly or impliedly on adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexual motivated physical conduct are directed at an employee because she is a female. (Such behavior) clearly may impact on the conditions of employment."[46] The court cited the Equal Opportunity Employment Commission's guidelines imposing responsibility on an employer for acts of co-employees if the employer knows or should have known of the conduct.

Two cases exist that raise the tangential concern of liability for acts of non-employees, although in both cases it was a policy of the employer that made the employees vulnerable to harassment by customers. In *EEOC and Hasselman v. Sage Realty Corporation*,[47] a building management company had bicentennial uniforms designed for its female lobby attendants. The uniforms were ponchos, held at the wrists and sides by snaps and tacks. The plaintiff was required to wear the uniform despite her complaints that it was revealing, sexually provocative, and elicited lewd comments from men passing through the lobby. The court found the employer liable for requiring plaintiff to wear a uniform which could reasonably be expected to lead to sexual harassment on the job and which had no valid business purpose. The plaintiffs in *Marentette v. Michigan Host Inc.*,[48] were waitresses who protested being required to wear uniforms they considered sexually provocative. Although the case

---

43. 651 F.2d 934, 945.

44. *Id.* at 945. A similar result is reached in Brown v. City of Guthrie, 22 Fair Empl. Prac. (BNA) Cas. 1627 (W.D. Okla. 1980). This case involved a claim by a woman employed as a police dispatcher. The sexual suggestions here were even more offensive than in *Bundy* and included the use of nude pictures and recent videotapes of strip searches of female prisoners. The court cited the EEOC guidelines in concluding that there had been sexual harassment and, while observing that the exact degree or amount of harassment necessary to impose liability might often be difficult to determine, referred to the EEOC's "Totality of the Circumstances" test.

45. 22 Fair Empl. Prac. (BNA) Cas. 1808 (Minn. 1980).

46. *Id.* at 1813.

47. 24 Fair Empl. Prac. (BNA) Cas. 1521 (S.D.N.Y. 1981), 507 F. Supp. 599 (S.D.N.Y. 1981).

48. 24 Fair Empl. Prac. (BNA) Cas. 1665 (E.D. Mich. 1980).

was dismissed on defendant's motion for summary judgment on grounds of mootness, the court observed that if such uniforms, in fact, subjected employees to sexual harassment, the requirement to wear them was not a reasonable dress and grooming code, but became actionable sex discrimination under title VII.[49]

The most recently reported case is once again from the District of Columbia Court of Appeals. In *Vinson v. Taylor*,[50] the court reversed and remanded the district court's decision that Vinson had not made out a case of sex discrimination violative of title VII because there was no loss of employment, promotion or disciplinary action taken against her.[51] Furthermore, the district court held that the defendant's employer, Capitol City, could not be held liable for any sexual relationship engaged in by Vinson and Taylor, even if considered a violation of title VII, because it had no notice of the offensive conduct charged to Taylor.[52]

The court of appeals, in rejecting the district court's interpretation of title VII, reiterated the principles it established in *Barnes v. Costle*[53] and in *Bundy v. Jackson*:[54]

> 1. Abolition of the job of a female employee because she spurned her male superior's sexual advancement is an infringement of Title VII;
> 2. A violation of Title VII may occur simply for pervasive on-the-job sexual harassment by superiors.[55]

Vinson's grievance was the latter type and an inquiry must be made as to whether or not Taylor created or condoned a substantially discriminatory work environment, regardless of whether Vinson lost any tangible job benefits as a result of the discrimination.[56] Therefore, the case was remanded so that the lower court could ascertain if, in fact, Vinson was subjected to "sexually stereotyped insults" or demeaning propositions that illegally poisoned the "psychological and emotional work environment."[57]

Turning to the question of employee liability the court declared:

> We have no difficulty in concluding that an employer may be held accountable for discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, to promote or to fire. An employer's delegation of this much authority rests in the

---

49. *Id.*
50. 36 Fair Empl. Prac. (BNA) Cas. 1423 (D.C. Cir. 1985). *See also* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), Katz v. Dole, 709 F.2d 251 (4th Cir. 1981).
51. 36 Fair Empl. Prac. (BNA) Cas. at 1426.
52. 36 Fair Empl. Prac. (BNA) Cas. at 1427.
53. 561 F.2d 983 (D.C. Cir. 1977).
54. 641 F.2d 934 (D.C. Cir. 1981).
55. 36 Fair Empl. Prac. (BNA) Cas. at 1426.
56. *Id.*
57. *Id.* at 1427.

> supervisor such extreme power over the victimized employee that the supervisor's stature as an "agent" of the employer cannot be doubted. We do not believe, however, that vicarious responsibility is limited to discrimination by supervisors so richly endowed. The mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees .... For this reason, we think employers must answer for sexual harassment of any subordinate by any superior."[58]

Therefore, the court held the employer liable for Taylor's sexual harassment of Vinson, even though the employer had no direct knowledge of the allegations. Thus, this decision also upholds the EEOC guidelines which hold employers responsible for the actions of their agents and supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[59]

In summarizing the title VII cases on sexual harassment, several principles can be delineated:

- Sexual harassment is discrimination based on sex and is a violation of title VII of the Civil Rights Acts of 1964 and as amended in 1972.
- Sexual harassment is behavior towards a person based on their sex.
- The behavior must be unwelcomed by the recipient.
- The victim must be unable to stop the behavior.
- The harassment complained of must have affected a term, condition or privilege of employment, which includes psychological well being in the work setting.
- The harassing behavior must be by someone under the employer's control such as supervisor, agent, coworker or customer.
- The employer knew or should have known that the harassing behavior occurred and chose to ignore the situation.

The above illustrates the evolving state of the law and its interpretation by the courts. In the last decade, courts have been more willing to find sexual harassment a form of sex discrimination and therefore a violation of title VII.

Title IX of the Education Amendments of 1972

In addition to the provisions of title VII, employees of educational institutions, as well as students, have an avenue of redress for alleged sexual harassment under title IX of the Education Amendments of 1972.[60] The amendments prohibit discrimination on the basis of sex in

58. *Id.* at 1430.
59. 28 C.F.R. § 1604.11(c). For an indepth review of case law and commentary on sexual harassment, see special symposium volume, 10 Capital Univ. L. Rev. (1981).
60. 20 U.S.C. § 1681(a).

any educational program or activity receiving federal financial assistance. Specifically:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.[61]

The accompanying regulations provide protection in the areas of admission and recruitment to schools; educational programs and activities, including access to course offerings; housing and facilities; counseling and financial assistance, health and insurance benefits; marital or parental status; athletics; as well as employment assistance to students and general employment practices.[62] It is evident that title IX has its philosophical foundations in, and has been modeled after, title VI of the Civil Rights Act of 1964 as well as title VII.[63] Thus, when courts are asked to interpret title IX cases, they are likely to refer to previous decisions made in relation to title VI and title VII.[64]

The question of whether title IX applies to the employment practices of educational institutions is one that has had a long and active history in the courts.[65] The Supreme Court resolved this conflict in the *North Haven Board of Education v. Bell*[66] decision, by holding that title IX does prohibit sex discrimination in employment practices of educational institutions. The Court reviewed the legislative history, statutory language and administrative interpretations in arriving at their decision. However, the Court left open for future judicial interpretation the question of the manner in which federal financial assistance may be received by educational institutions for title IX to apply.

This interpretation was followed by the Supreme Court decision in *Grove City College v. Bell*[67] when the Court held:

> We conclude that the receipt of BEOGs by some of Grove City's students does not trigger institution wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own federal aid program, and it is that program that may properly be regulated under Title IX.[68]

---

61. *Id.*
62. Educational Amendments of 1972 § 901.
63. 42 U.S.C. §§ 2000d, 2000e.
64. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979); Guardians Ass'n v. Civil Serv. Comm. of New York, 103 S. Ct. 3221 (1983).
65. *See* Dougherty County School Sys. v. Harris 662 F.2d 735 (1980); Seattle Univ. v. United States Dep't of Health, Educ. and Welfare 621 F.2d 992 (1980); Romeo Community Schools v. United States Dep't of Health, Educ. and Welfare 600 F.2d 119 (1979); Islesboro School Comm. v. Califano 593 F.2d 424 (1979); Junior College of St. Louis v. Califano 597 F.2d 119 (1979).
66. 456 U.S. 512 (1982).
67. 104 S. Ct. 1211 (1984).
68. *Id.* at 1222.

In light of the *Grove City* case, one may assume that for title IX to apply to employment at the college or university level, the employee must be employed in a program receiving direct federal financial assistance. It should be noted however, that this decision only affects the coverage of institutions of higher education. It has been well settled that title IX applies to employment throughout public elementary and secondary education.

Sexual harassment has been held to violate the provisions of title IX. In the one reported appellate case, *Alexander v. Yale University*,[69] the court held, "It is clear that plaintiff Price is within the class Title IX was designed to protect ..."[70] Although title IX nor its regulations mention sexual harassment, the court interpreted its application to the fact situation in the same manner that courts have applied title VII to sexual harassment.

By applying the title VII guidelines to an educational setting, it is apparent that it would be illegal to require submission to sexually harassing behavior to be a condition for the successful completion of a course of study or any educational activity. Likewise, conditions that allow or foster nude pictures, lewd jokes, sexual advances, requests for sexual favors or other harassing activities in a school, college or university may be violative of title IX. Educational institutions must learn as employers have, that issues of sexual harassment must be taken seriously and that what constitutes harassment is to a certain extent in the "eyes of the beholder." The victim defines, within the confines of title VII and its implementing regulations, what is harrassing behavior.

Elementary and secondary schools have an additional obligation to provide a harassment free environment, as they have minor children who attend their schools, many under compulsory education laws. Schools must assure that the learning environment of their school is free from sexual harassment by administrators, teachers, staff and students. School employees are under the control of the board of education, particularly in their relationship to pupils, but schools must also be in control of pupils to the extent that an appropriate learning environment is maintained.

Schools, as well as employers, should take prompt and corrective action when given notice of sexually harassing behavior. No school should allow or condone sexual advances by an employee toward a student. An occurrence of sexual harassment between a teacher and student adversely affects learning opportunities for the student, places the student in a position of peril and certainly violates professional conduct on the part of the employee.

---

69. 459 F. Supp. 1. (1977), *aff'd on other grounds* 631 F.2d 178 (1980).
70. *Id.* at 5.

The courts have said title IX applies to employment and that sexual harassment is prohibited by title IX.[71] It is time for educational institutions to examine their policies and practices and to assess to what extent sexual harassment is evident in their corridors, classrooms, and campuses. To wait for complaints from students and charges of discrimination from employees is to ignore a societal concern that is finally being taken seriously and to subvert what should be a goal of our educational institutions — to provide an environment where students may prepare to achieve their educational, personal and career goals.

The following section will present policy recommendations and suggestions for preventing sexual harassment in employment and the school environment.

Recommendations

Employers as well as school districts need to develop policies and procedures to handle complaints of sexual harassment by employees and students as well as take action to reduce occurrences of harassment. School districts may easily amend their existing nondiscrimination policies required under title IX to include provisions for sexual harassment.[72] Employers, who have no policy concerning harassment, risk allegations that they are insensitive to the issue and may make them vulnerable to allegations condoning sexual harassment.[73] The following is a sample policy for addressing harassment:

> It is the policy of our company/school district/university that all our employees should be able to enjoy a work environment free from all forms of discrimination, including sexual harassment. Sexual harassment is a form of misconduct which undermines the integrity of the employment relationship. No employee should be subjected to unwanted, unwelcome sexual advances or conduct, either verbal or physical. Conduct that is harassing to other employees will not be tolerated. Such conduct, whether committed by supervisors, nonsupervisory personnel or nonemployees is prohibited. An employee who believes that he or she has been or is being subjected to harassing acts or conduct should bring such acts or conduct to the prompt attention of a supervisor, manager or administrator who is either his or her immediate superior, the personnel authority, or other appropriate management representative.

The above illustrates that a policy should include statements which reflect the following:

- sexual harassment is against employer policy;
- sexual harassment is considered misconduct;

71. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 538 (1982); Alexander v. Yale Univ. 459 F. Supp. 5 (1977); *see also* Board of Educ. of Alamo-Gordo Pub. School Dist. v. Jennings 651 P.2d 1037 (1982).

72. Educational Amendments of 1972 § 901.

73. 29 C.F.R. § 1604.11(f).

- a definition of sexual harassment;
- persons who are affected by the policy; and
- the person or persons who receive complaints of alleged discrimination.

It should be noted that employers must notify their employees of their policies concerning sexual harassment. These policies should be publicized so that employees who believe they are the object of sexual harassment know where they can bring their complaints. School administrators should also provide students and their parents, where appropriate, with district policies concerning sexual harassment and the procedure to be followed in lodging sexual harassment complaints.

The provision of a policy prohibiting harassment in and of itself is not sufficient to prevent sexual harassment. Employers need to establish awareness programs for their employees and/or students. Awareness programs should provide participants with the following information:[74]

- legal requirements regarding sexual harassment;
- employer's policy against sexual harassment;
- an explanation of the complaint procedure;
- employer's duty to report any evidence of harassment;
- employee's responsibility to ensure that his/her conduct does not sexually harass any other employee/student; and
- employees will cooperate with efforts to prevent and eliminate sexual harassment.

Providing and publicizing an awareness program informs all personnel that sexual harassment will not be tolerated within the organization. Informing parents and other community members of this program will reinforce the district's concern for the well being of its students.

Once an individual comes forward with a complaint of sexual harassment, certain actions and procedures are recommended for an investigation of the incident or behavior. An investigation of the complaint should include the following questions:

- "What happened and when did it happen?"
- "Did it affect your work? How?"
- "What were your feelings and what did you do about it?"
- "What is the background of the incident? What documentation do you have?"
- "Did anyone else see or here the incident?"
- "Did you talk to anyone else about it?"

If you observe an incident of sexual harassment, present your observations to the victim and ask for verification. In both instances, remember to listen attentively to what the victim says, be sensitive to the feelings involved. However, do not promise anything until you listen to the other side of the incident.

---

74. *Id.* "An employer should take all the steps necessary to prevent sexual harassment from occuring, such as affirmatively raising the subject, expressing strong disapproval and developing appropriate sanctions."

When interviewing the alleged harasser, present the person with the charge or your observation and ask for a response. Investigate by asking questions such as:

- "Describe your interaction with _____ (the alleged victim)."
- "Do you think you have ever done anything that might have caused the alleged victim to feel offended?"
- "To what degree do you think you use sexual language, innuendos, jokes or mannerisms in the work setting?"
- "What are the business reasons for your interactions with the alleged victim?"

Listen attentively to what the alleged harasser says and be equally sensitive to the feelings involved as with the alleged victim. Consider the degree to which the behavior was mutual and reciprocal. Document your interaction with the alleged harasser, do not rely on your memory.

It may be necessary to interview observers or third parties to the alleged harassment. Present your concerns and the basis of the complaint to the observer and request that this matter be kept confidential. Investigate by asking questions such as:

- "What type of interaction have you observed between the alleged victim and the alleged harasser?"
- "From your point of view was the alleged harasser bothering the alleged victim?"
- "Are there others who might be able to comment on their interaction?"
- "Did the alleged victim ever complain to you about the alleged harasser's behavior?"

Again, listen attentively to what the observers say and document your interactions with the observers or third parties.

If your investigation shows that sexual harassment does not exist take appropriate corrective action with the person who made the charge. For the accused person, take appropriate action to maintain or restore his or her credibility. Be supportive of this person with others in the workplace.

If sexual harassment exists it will be necessary to document your findings and take appropriate disciplinary action according to company or school policy. It will also be important to monitor future interactions between the individuals involved. Be aware of the possibility of reprisals by the harasser or victim once appropriate corrective action has been taken.

Investigating complaints of harassment is a difficult but important task. Employees and students must be assured that their complaints will be viewed as a serious matter and will receive proper attention.

Summary and Conclusion

This chapter has presented the statutory and case law concerning sexual harassment in employment and education practices. The

statutory provisions of title VII and title IX were examined and their implementing regulations were highlighted in relation to sexual harassment.

A review of the cases illustrate that the courts recognize sexual harassment as a form of sex discrimination violative of title VII and title IX. The decisions also indicate an increasing willingness on the part of the courts to redress complaints of sexual harassment in employment and in education.

Recommendations and suggestions were also provided to assist in confronting the problems of sexual harassment. A sample policy was presented and the elements of an awareness program were identified. In addition, techniques for investigating complaints and taking appropriate action were discussed.

Sexual harassment affects both men and women. It has no place in employment or education. All employees and students have the right to work and learn in a harassment free environment.